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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Grigsby-Grunow Company was adjudicated bankrupt March 10, 1934.

When the receivers in equity were appointed for that company on November 24, 1933, the company owed to the petitioner the amount of prior loans and interest thereon at the rate of 20 per cent, in the aggregate of $269,700.78. (Rec., 45.)

Petitioner held as security $550,000 of assigned trade acceptances and assigned accounts receivable. Upon

the assignment of the accounts receivable, notices had not been given to the debtors, and such notices were not at any time given, so that the checks in payment of the assigned accounts were received by the receivers, as such checks had been received by the company prior to the receivership. The receivers borrowed no money from the petitioner. The controversy relates only to the manner in which the receivers liquidated petitioner's secured claim and freed the security.

The receivers deposited all collections upon such assigned accounts in a special account, and with appropriate court orders paid $186,162.48 to the petitioner in three installments between November 24, 1933 and December 29, 1933. This sum of $186,162.48, together with petitioner's realization prior to December 29, 1933 upon the assigned trade acceptances, paid in full the amount of $269,700.78 owed at the date of appointment of the receivers. (Rec., 44, 45.)

The receivers consented to payment to the petitioner of interest from November 24, 1933, to December 29, 1933, at the rate of 7 per cent. (Rec., 74.) The petitioner claimed in the equity proceeding interest from the date of receivership at varying rates from 20 per cent to 250 per cent, averaging 28⅔ per cent for the period. (Rec., 73, 74.) Petitioner further claimed $7,800 as attorneys' fees. (Rec., 70.) The precise difference between the receivers and the petitioner was: $3,096.22 as to interest, and $7,800 as to attorneys' fees.

The basis of the claim for interest at rates varying from 20 per cent to 250 per cent, and averaging 28⅔ per cent, was as follows. A complicated contract had been entered into between the petitioner and Grigsby-Grunow Company under which advances in varying amounts had been made, the balance of which together with 20 per cent interest, amounted at the inception of the receivership to $269,700.78.

Under the provisions of this contract, interest was computed *not upon the amount of the outstanding balances of advances but upon the face amount of trade acceptances and accounts receivable assigned.* The statement by us and by our opponents that this interest was at the rate of 20 per cent upon the outstanding balance of advances was correct, because the security so pledged was maintained at approximately twice the amount of outstanding balances of advances, and settlements between the petitioner and the company were always upon the basis of 20 per cent interest upon outstanding balances. (Rec., 63.) When checks were received by the company, the checks had been taken by the company to the petitioner and half of the amount thereof were forthwith returned to the company, the security thereby being maintained at twice the outstanding balance of advances and the interest being always 20 per cent upon outstanding advances.

When, however, the receivers were appointed, the petitioner claimed the right to receive *full* collections upon the assigned trade acceptances and accounts receivable, and retained as security all of the remaining trade acceptances and accounts originally assigned. Petitioner also claimed the right to compute interest solely upon the face amount of the entire security remaining, notwithstanding the fact that the applications of money between November 24, 1933 and December 29, 1933 gradually extinguished, and on the latter date completely extinguished, the principal of the debt. This resulted in a sharp and, as we contend, an arbitrary increase in the rate of interest, so that upon the last balance of principal, according to their claim, the rate of interest actually reached 250 per cent, the average from November 24, 1933 to December 29, 1933 being $28\frac{2}{3}$ per cent. (Rec., 65, 95.)

The petitioner not only asserted in equity this ex-

traordinary claim but also asserted a claim for $7,800 attorneys' fees alleged to have been incurred in such assertion of claim.

The claim was shocking to a court of equity for three reasons:

1. It evidenced an assertion of, and an insistence upon, a contract claim upon a basis more onerous than the petitioner had asserted against the company itself, and in excess of its profits under its contract as the petitioner and the company had themselves operated under that contract.

2. It evidenced an assertion of, and an insistence upon, a claim for attorneys' fees in the amount of $7,800, whereas the total amount in dispute was $3,096.22.

3. It evidenced an assertion of, and an insistence upon, such claims to the disadvantage of other creditors, though the chancellor found that the work of the receivers and an expenditure by them of $35,000 in merchandise advertising, contributed substantially to the liquidity of the assigned accounts, a considerable portion of which were owed by persons who had purchased the merchandise for resale at wholesale or retail with contemplation of company advertising.

Petitioner asserts that the two courts below have denied that in Illinois a corporation may contract for payment of interest in excess of the statutory rate. Neither court so held. The case of *Tennant* v. *Joerns*, 329 Ill. 34 is not questioned.

The finding by the chancellor was that the petitioner did not do equity and did not offer to do equity. The finding was amply justified.

As evidence of what was decided by the District

Court and by the Circuit Court of Appeals we quote from the two opinions.

The District Court opinion (Rec., 71):

"It may be conceded that the foregoing propositions are correct statements of rules of law applicable in proper cases. In the court's opinion, they are not applicable here. The intervening petitioner has lost sight of one of the fundamental maxims of equity, namely, He who comes into equity must come with clean hands, or, expressed in another form, He that hath committed iniquity shall not have equity. In this case, and so far as the opportunities of this court for observation has extended in other cases, loan companies which make their loans by means of the method of purchasing accounts, uniformly refrain from giving notice, prior to receivership or bankruptcy, to the debtors of the assignment. It is said that they so refrain because if they did not so refrain they would alienate all of their customers; and, so far as the court's observation has extended, they refrain from giving notice to debtors of the assignment after receivership or after bankruptcy for the reason, as has been said, that the debtors are more likely to pay if they remain in ignorance of the assignment. As has been indicated in the case at bar, as regards the large majority of the assigned accounts, the intervening petitioner did not give notice to the debtors either before or after the appointment of receivers. The receivers have in this case gone to extraordinary efforts to maintain the integrity of the business of the defendant and to preserve the accounts receivable, including the pledged accounts, as live assets. Among other things, the receivers have expended the sum of approximately $35,000 in an advertising campaign, one of the principal purposes of which was to maintain the good will of the defendant and to preserve the receivables of the defendant as live and valuable assets. The intervening petitioner has had the benefit of the services of this court of equity. It is said that the court restrained the intervening petitioner from giving notice of the assignment of the accounts. The court observes that no motion has at any time been made to vacate that restraining order. The fact is

that the intervening petitioner, because it refrained from giving notice of the assignment of the pledged accounts, was compelled to and did seek and accept the good offices of this court of equity in and about the collection of the pledged accounts. * * *

It is inconceivable that a court of conscience should be compelled to do the unconscionable thing of paying twenty eight per cent interest per annum. Perhaps the court should say further, concerning the claim for attorney's fees, that the court cannot see any reason for the intervening petitioner having obligated itself for attorney's fees in any considerable amount. There has never been any doubt at any time but that, to the extent that the proceeds of the pledged accounts would become available, the principal of intervening petitioner's debt and contract interest thereon to the date of the appointment of the receivers, and legal interest thereon thereafter would be paid."

The Circuit Court of Appeals opinion, 72 F. (2d) 471, 473:

"If this case arose in an action at law between the original parties it may well be that the court could not refuse to enforce the contract according to its strictest terms. But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177 per cent of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we can not feel that a court of equity is any place for him to press his demands. As stated in *National Fire Insurance Co.* v. *Thompson*, 281 U. S. 331, 50 S. Ct. 288, 291, 74 L. Ed. 881, 'Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.'"

The foregoing opinions are amply supported by authorities.

Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.

National Fire Insurance Co. v. *Thompson*, 281 U. S. 331.

Pomeroy's Equity Jurisprudence (4th ed.), Vol. I, Sec. 397.

If a court of equity is compelled to submit to an assertion, under such an equivocal contract, of a claim for interest after the date of receivership averaging 28⅝ per cent and running as high as 250 per cent, contrary to the parties' own operations under the contract, then the principle enunciated above has little meaning.

The cases cited by the petitioner, *In Re International Raw Materials Corporation*, 22 F. (2d) 920 and *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 F. (2d) 940, involve no such findings and no such facts. In those two cases, upon which petitioner relies, there was no suggestion that the complainant had changed its position or was conducting itself in an inequitable manner.

Indeed, the case of *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 F. (2d) 940, (C. C. A. 8, 1934) allowed contract interest to the date of receivership precisely as was allowed in the present case, and allowed only 6 per cent interest (p. 946) after the date of the receivership, whereas in the present case the petitioner was allowed 7 per cent interest after the date of the receivership. The Circuit Court of Appeals for the Second Circuit, *In Re International Raw Materials Corporation*, 22 F. (2d) 920, does not appear to have made any allowance of interest different from the allowance in the present case and in the Merchants and Manufacturers Securities Company case, and it does not appear from the

opinion that the contention here made by petitioner was there even raised or considered.

In the following cases, persons who sought equitable relief under facts somewhat analogous to the facts of the present record, were considered under the particular facts of such cases to be guilty of overreaching:

In re Chicago Reed & Furniture Co., 7 F. (2d) 885, (C. C. A. 7, 1925).

La Sueur v. *Manufacturers' Finance Co.*, 285 Fed. 490, 500 (C. C. A. 6, 1922).

That the contract is not a contract for services but merely a secured contract for lending money, as found by the courts below, is well settled.

Home Bond Co. v. *McChesney*, 239 U. S. 568.

National Discount Co. v. *Evans*, 272 Fed. 570 (C. C. A. 6, 1921).

La Sueur v. *Manufacturers' Finance Co.*, 285 Fed. 490 (C. C. A. 6, 1922).

Wherefore, it is respectfully submitted that this record presents no conflict whatever between different circuit courts of appeals, and presents ordinary application of principles of equity and particularly the application of the principle that one who seeks equity must do equity. The findings are supported by the evidence, and the findings support the decree. The decree is fair and equitable.

Respectfully submitted,

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